In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE UNITED STATES OF AMERICA EX RELATIONE JOHN W. FRENCH, plaintiff in error,
v.
JOHN W. WEEKS, SECRETARY OF WAR. } No. 724.

THE UNITED STATES OF AMERICA EX RELATIONE WILLIAM F. CREARY, plaintiff in error,
v.
JOHN W. WEEKS, SECRETARY OF WAR. } No. 725.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION BY DEFENDANT IN ERROR TO ADVANCE.

Comes now the defendant in error by the Solicitor General of the United States and moves the court to advance the above-entitled causes and set them for hearing together on as early a date of the present term as may be convenient to the court.

These cases involve the construction and administration of section 24b of the National Defense Act of June 3, 1916 (39 Stat. 166), as amended by the act of June 4, 1920 (41 Stat. 759).

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The facts in the two cases are identical, except that in No. 724 John W. French, the plaintiff in error, was retired from active service with the pay and allowances in such case provided by the statute, whereas in case No. 725 William F. Creary, the plaintiff in error was discharged from the Army without pay.

Both plaintiffs in error, who formerly were officers of the United States Army on the active list with the rank of colonel, filed petitions in the Supreme Court of the District of Columbia challenging the legal validity and effectiveness of the proceedings under the statute that resulted in their respective retirement and discharge, the prayers of said petitions being that writs of mandamus issue commanding the respondent, Newton D. Baker, then Secretary of War (the present defendant in error having succeeded to the office of Secretary of War, and the court having made an order substituting him for the original respondent), to reinstate each of said plaintiffs in error in the office of colonel on the active list in the Regular Army of the United States. Answers to the petitions were filed, and the relators (now plaintiffs in error) demurred thereto. The demurrers were argued together; and judgments were entered April 29, 1921, directing that peremptory writs of mandamus issue against the present defendant in error, commanding him to vacate the military orders by which plaintiffs in error were retired and discharged, respectively, and to reinstate them in their former offices and status as colonels of Infantry on the active

list of the Army. Upon review by the Court of Appeals of the District of Columbia, that court held that the courts were without jurisdiction to compel the military orders aforesaid to be vacated and that the reinstatement of the relators could not be accomplished in these proceedings. The said Court of Appeals accordingly reversed each of said judgments of the Supreme Court of the District of Columbia. The cases now are before this court on writs of error to the Court of Appeals of the District of Columbia.

The elimination of officers from the active service by retirement and discharge in consequence of proceedings under section 24b of the statute aforesaid has created vacancies in the Army, to wit, 113 vacancies, all of them under proceedings inaugurated by the 1920 provisional classification board. Further vacancies under proceedings inaugurated by the 1921 board are to be expected in the immediate future. The filling of said 113 vacancies, although required by the needs of the Army, has been delayed and embarrassed, because of doubt and uncertainty, created by the pendency of the above-entitled causes, as to the validity and legal effectiveness of said 113 elimination proceedings, which validity and effectiveness could not be sustained in any of these cases if the contentions submitted for adjudication by the relators (now plaintiffs in error) herein are sound.

The 113 vacancies aforesaid have accordingly not yet been filled, but in lieu thereof only 78 of said vacancies have been filled by the promotion of other

Army officers, whose nominations, confirmations, and appointments in the new grades have been made, but without express reference in each case to the specific vacancy filled, the present practice differing from that considered in *Blake* v. *United States* (103 U. S. 227). If these 78 appointments to office are invalid because of lack of vacancies to be filled or otherwise, grave injury and disadvantage to the Army and to the War Department will result, which said injury and disadvantage will be great in proportion to the length of time elapsing before the defect can be cured.

Should it be determined that the action of the War Department in retiring and discharging officers under the statute was improper, ineffective, and illegal, several hundred persons who now and for a considerable time are and have been regarded by the War Department as not being connected with the active service would seem to have been deprived unlawfully of valuable rights, and the further deprivation thereof for any length of time that is avoidable would seem to be unwarranted.

It is important, therefore, to the War Department, to the Army at large, to the particular officers concerned, and to the general public that the filling of vacancies required by the Army should not be delayed longer than necessary, that doubt as to the status of those actually appointed to fill apparent vacancies should be removed as soon as possible, and that the possibility of being required to conduct

elimination proceedings a second time with reference to the same officers be obviated as soon as possible; wherefore, it is respectfully submitted that the present motion to advance for hearing is entitled to the favorable consideration of this court.

Opposing counsel concur in this motion.

JAMES M. BECK,
Solicitor General.

WASHINGTON, D. C., *February 27, 1922.*

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